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UNITED STATES OF AMERICA

11 UNITED STATES DISTRICT COURT
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 IN THE MATTER OF THE SEIZURE
14 OF:

15 ANY AND ALL FUNDS HELD IN
16 REPUBLIC BANK OF ARIZONA
ACCOUNTS XXXX1889;
17 XXXX2592, XXXX1938,
XXXX2912, AND XXXX2500.

No. CV 18-06742-RGK (MAAx)

**GOVERNMENT'S OPPOSITION TO
MOTION TO VACATE OR MODIFY
SEIZURE WARRANTS**

Hearing Date: 9/24/2018
Hearing Time: 9:00 A.M.
Location: Courtroom of the Hon.
R. Garv Klausner

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20 Plaintiff United States of America, by and through its counsel of record, the
21 United States Attorney for the Central District of California and Assistant United States
22 Attorney John J. Kucera, hereby files its Opposition to Motion to Vacate or Modify
23 Seizure Warrants.

24 This Opposition is based upon the attached memorandum of points and
25 authorities, the files and records in this case, and such further evidence and argument as
26 the Court may permit.
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I. BACKGROUND AND PROCEDURAL HISTORY

On March 28, 2018, April 9, 2018, April 26, 2018, and June 24, 2018, pursuant to 18 U.S.C. §§ 981(a)(1)(C) and 982(a)(1) and (b); 21 U.S.C. § 853(p); and 28 U.S.C. § 2461(c), United States Magistrate Judges for the Central District of California Patrick J. Walsh, John E. McDermott, Jean Rosenbluth, and Rozella A. Oliver issued similar but separate seizure warrants for certain assets (the “seized assets”) (attached as Exhibit A) in the matters detailed in the following chart:

DATE	MAGISTRATE JUDGE	ASSET
3/28/18	Hon. Patrick J. Walsh	Information associated with the domains registered by ASCIO/WMB Inc. dba Netnames
3/28/18	Hon. Patrick J. Walsh	Any and all funds held in Ascensus Broker Deal Services, Inc. account: ‘43-01 and ‘80-01
3/28/18	Hon. Patrick J. Walsh	Any and all funds held in Bank of America, N.A. accounts ‘9342, ‘0071, ‘8225, and ‘7054
3/28/18	Hon. Patrick J. Walsh	Any and all funds held in Compass Bank Accounts ‘3873 and ‘3825
3/28/18	Hon. Patrick J. Walsh	Any and all funds held in First Federal Savings & Loan of San Rafael Account ‘3620
3/28/18	Hon. Patrick J. Walsh	Any and all funds held in National Bank of Arizona account ‘0151, ‘0178, ‘3645
3/28/18	Hon. Patrick J. Walsh	Any and all funds held in Prosperity Bank Account ‘7188
3/28/18	Hon. Patrick J. Walsh	Any and all funds held in Republic Bank of Arizona Account ‘1889, ‘2592, ‘1938, and ‘2500
3/28/18	Hon. Patrick J. Walsh	Any and all funds held in San Francisco Fire Credit Union Account ‘2523
3/28/18	Hon. Patrick J. Walsh	Any and all funds held in Ally Bank Account ‘6292
3/28/18	Hon. Patrick J. Walsh	Any and all funds held in Branch Banking and Trust Account ‘0218
3/28/18	Hon. Patrick J. Walsh	Any and all funds held in Green Bank Accounts ‘4832 and ‘4293

1	4/9/18	Hon. Patrick J. Walsh	Any and all funds, securities, and other assets held in or maintained by Perkins Coie Trust Company Account '0012
2			
3	4/9/18	Hon. Patrick J. Walsh	Any and all funds held in Alliance Bernstein Account '6878, '4954, '0582, '7892, '7889, '7888
4			
5	4/9/18	Hon. Patrick J. Walsh	Any and all funds, securities, and other assets held in or maintained by Live Oak Bank Account '6910
6			
7	4/26/18	Hon. John E. McDermott	Any and all funds held in Republic Bank of Arizona Accounts '2485, '3126, '8316, '8324, '8332, '8103, '8162, and '8189
8			
9	4/26/18	Hon. John E. McDermott	Any and all funds held in K&H Account '1210
10			
11	4/26/18	Hon. John E. McDermott	Any and all funds held in Fio Bank Accounts 5803, '5801, '5805, '2226, '2231, '2230, '4194, '4196, '4198, '8083, '8086, and '8080
12			
13	4/26/18	Hon. John E. McDermott	Any and all funds held in Knab Bank Account '7664
14			
15	4/26/18	Hon. John E. McDermott	Any and all funds held in Rabo Bank Accounts '2452 and '4721
16			
17	6/4/18	Hon. Jean Rosenbluth	Any and All funds held in Acacia Conservation Funds LP, Account '2020
18	6/4/18	Hon. Jean Rosenbluth	Saxo Payments, Account '1262, Held in the Name of Cashflows Europe Limited
19	6/4/18	Hon. Jean Rosenbluth	LHV Pank, Account '4431

20 On March 28, 2018, the same day the first seizure warrant was issued in the
21 Central District of California ("CDCA"), the government unsealed a related Indictment
22 returned by a Grand Jury in the District of Arizona, charging defendants Michael
23 Lacey, James Larkin, Scott Spear, John Brunst, Dan Hyer, Andrew Padilla, and Joye
24 Vaught (collectively, "defendants"). *See* CR 18-422-PHX-SPL (BSB), Dkt. #3,
25 attached hereto as Exhibit B. In that Indictment, the government included forfeiture
26 allegations giving notice of the government's intent to forfeit certain of the seized
27 assets. Thereafter, on July 25, 2018, a Grand Jury in the District of Arizona returned a
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1 True Bill (the “Superseding Indictment”) charging defendants with the following
2 criminal violations: 18 U.S.C. § 371 (Conspiracy); 18 U.S.C. § 1952(a)(3)(A) and
3 (b)(1)(i) (Travel Act—Facilitate Prostitution); 18 U.S.C. § 1956(h) (Conspiracy to
4 Commit Money Laundering); 18 U.S.C. § 1956(a)(1)(B)(i) (Concealment Money
5 Laundering); 18 U.S.C. § 1956(a)(2)(A) (International Promotional Money
6 Laundering); 18 U.S.C. § 1957(a) (Transactional Money Laundering); and 18 U.S.C. §
7 1956(a)(2)(B)(i) (International Concealment Money Laundering). *See* CR 18-422-
8 PHX-SPL (BSB), Dkt. #230, attached hereto as Exhibit C. The Superseding Indictment
9 included forfeiture allegations, pursuant to 18 U.S.C. §§ 981(a)(1)(C) and 982(a)(1) and
10 (b); 21 U.S.C. § 853(p); and 28 U.S.C. § 2461(c), seeking to forfeit specific assets in
11 which any defendant holds an interest. Following this, on August 24, 2018, also in the
12 District of Arizona, the government filed a Bill of Particulars, identifying additional
13 assets also subject to forfeiture pursuant to the same provisions described in the
14 Superseding Indictment. *See* CR 18-422-PHX-SPL (BSB), Docket #281, attached
15 hereto as Exhibit D. Together, the Superseding Indictment and the Bill of Particulars
16 identify each asset that defendants’ Motion to Vacate seeks to have released from
17 government custody (collectively, the “Indicted Assets”).

18 Subsequent to the filing of the Superseding Indictment and the Bill of Particulars,
19 on August 27, 2018, in the District of Arizona, the government filed its Application for
20 Order Regarding Criminal Forfeiture of Property in Government Custody in the related
21 criminal case, CR 18-00422-PHX-SPL (BSB), Docket #282. *See* Exhibit E-1. On
22 August 29, 2018, defendants filed an Opposition to that Application, arguing, among
23 other things, that the government has “engaged in blatant forum shopping” by seeking
24 to restrain the assets in the district where the criminal case remains pending. *See*
25 Opposition, Docket #285, attached as Exhibit E-2, at p. 3.

II. ARGUMENT

A. Defendants' Motion Lacks Legal Basis For Relief

In their Motion, defendants site no legal theory for their request for the return of the Indicted Assets following their inclusion in an indictment. Defendants seek to challenge the probable cause findings of three CDCA magistrate judges as well as those of the District of Arizona's Grand Jury. The government, of course, will bear the burden of proof of its right to forfeit the Indicted Assets during the trial in the District of Arizona and any subsequent forfeiture portion of that trial. *See* Fed. R. Crim. P. 32.2.

Defendants style their request for the return of property as a "Motion to Vacate" rather than calling it what it really is, a Motion to Return Property pursuant to Federal Rule of Criminal Procedure 41(g), or a motion challenging Sixth Amendment violations pursuant to *United States v. Monsanto*, 491 U.S. 600, 109 S. Ct. 2657, 105 L. Ed. 2d 512 (1989).

Had defendants captioned their motion as one pursuant to Rule 41(g), the law is clear that such motions are not available once the government has initiated criminal forfeiture proceedings against the assets at issue. *See e.g., United States v. Wetselaar*, 2013 WL 8206582, *19 (D. Nev. Dec. 31, 2013) ("It is well-settled that the Government may defeat a Rule 41(g) motion by demonstrating that the property is subject to federal forfeiture," *citing United States v. Fitzen*, 80 F.3d 387, 389 (9th Cir.1996).); *United States v. Chambers*, 192 F.3d 374, 376 (3d Cir.1999) (A Rule 41(g) motion "is properly denied if the defendant is not entitled to lawful possession of the seized property, the property is contraband or subject to forfeiture or the government's need for the property as evidence continues").

Had defendants captioned their motion as one pursuant to *Monsanto*, seeking funds necessary to retain counsel for the criminal proceedings, the law is equally clear that, as a threshold requirement for a hearing regarding the return of seized funds, defendants must first establish that they "do not have sufficient alternative, unrestrained

1 assets to fund counsel of their choice.” *United States v. Swenson*, 2013 WL 3322632, at
2 *7 (D. Idaho July 1, 2013), *citing U.S. v. Unimex*, 991 F.2d 546 (9th Cir. 1993). “The
3 Government is not required to reestablish probable cause without the defendant first
4 meeting this initial burden. Indeed, a Sixth Amendment concern is not raised until the
5 unseized assets are exhausted or counsel represent that he or she is unable to continue the
6 representation due to a lack of funds.” *Wetselaar*, 2013 WL 8206582, at *23, *citing*
7 *United States v. Ray*, 731 F.2d 1361 (9th Cir.1984).

8 At most, in a footnote, defendants site to *United States v. Roth*, 912 F.2d 1131 (9th
9 Cir. 1990) for the proposition that their Motion to Vacate is in “connection . . . with an
10 application for temporary restraining order or preliminary injunction.” Defendants’
11 Motion, p.1, fn. 1. A charitable interpretation of defendants’ position might construe
12 defendants’ Motion as requesting a hearing similar to the kind sought by the claimant in
13 *Roth*.

14 *Roth*, however, is inapplicable to the facts of this case. In *Roth*, the Ninth Circuit
15 held that, in certain circumstances, pursuant to Rule 65 of the Federal Rules of Civil
16 Procedure, a protective order issued pursuant to 21 U.S.C. Section 853(e) allows for a
17 hearing in connection with that restraining order. *Roth*, 912 F.2d at 1133. In this case,
18 however, the government did not obtain a restraining order pursuant to Section 853(e)
19 when it first seized the funds. Rather, the CDCA courts issued seizure warrants pursuant
20 to 21 U.S.C. Section 853(f) (as referred through 28 U.S.C. § 2461(c)).

21 More on point is *U.S. v. Unimex*, 991 F.2d 546 (9th Cir. 1993), which involved a
22 seizure warrant, as well as the criminal defendant’s Sixth Amendment right to counsel.
23 In *Unimex*, prior to a criminal trial, the corporate defendant had all of its assets seized
24 pursuant to a warrant. *Id.* at 547. The indictment included money laundering allegations
25 and forfeiture allegations that all of Unimex’s assets were subject to forfeiture pursuant
26 to 18 U.S.C. § 982(a)(1), and the government filed a parallel civil action against Unimex
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1 for forfeiture of all its property under 18 U.S.C. § 981 and 21 U.S.C. § 881 for
2 substantially the same conduct. *Id.* at 548.

3 Unimex moved for the return of a portion of seized funds to be used to retain
4 counsel. *Id.* The district court denied Unimex's motion without an evidentiary hearing,
5 and Unimex proceeded to trial with no representation. *Id.* The Ninth Circuit reversed
6 Unimex's conviction, finding that Unimex's Sixth Amendment right to counsel and Fifth
7 Amendment due process rights were violated by taking away all of its assets, denying it
8 an opportunity for a pretrial hearing to show that the funds it sought in order to pay
9 counsel were not subject to forfeiture, and then forcing it to trial without counsel. *Id.* at
10 550. In reaching this conclusion, however, the Circuit **did not** say the district court was
11 required to hold a hearing to determine whether probable cause existed to uphold the
12 seizure warrant. Rather, *Unimex* stands for the proposition that the hearing defendants
13 now seek is only required after defendants make a sufficient evidentiary showing that
14 there are no adequate alternative, unrestrained assets to fund counsel of choice. *See*
15 *Swenson*, 2013 WL 3322632, at *8. Such a showing has not been made.

16 **B. Defendants' Motion Improperly Requires Disclosure of Prosecution**
17 **Strategy in the Pending District of Arizona Criminal Matter**

18 Defendants' Motion to Vacate would force the government to disclose discovery-
19 type materials otherwise unavailable to defendants at this point in the criminal matter
20 now pending in the District of Arizona. At present, the government has not yet filed
21 civil forfeiture actions. Although the government intends to file civil forfeiture
22 complaints related to the pending Superseding Indictment, the government has not yet
23 filed such complaints, and the criminal matter pending in District of Arizona is the only
24 pending proceeding related to the Indicted Assets. Since there is no pending civil
25 forfeiture action and only the indictment, "the Government's right to continued
26 possession of the property shall be governed by the applicable criminal forfeiture
27 statute." *See* 18 U.S.C. §983(a)(3)(C). As described above, the government has
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1 applied to the Court in the District of Arizona for a protective order pursuant to the
2 criminal forfeiture statute, 21 U.S.C § 853(e). *See* Exhibit E-1. Further, the criminal
3 prosecution would be compromised through deliberate or inadvertent disclosures
4 caused by a hearing held in CDCA on defendants' Motion.

5 Inherent conflicts arise from the distinct discovery issues related to simultaneous
6 criminal matters and civil proceedings. *Degen v. United States*, 517 U.S. 820, 825
7 (1996); *see Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1203–1204
8 (C.A.Fed.1987); *Campbell v. Eastland*, 307 F.2d 478, 487 (C.A.5 1962). “A criminal
9 defendant is entitled to rather limited discovery, with no general right to obtain the
10 statements of the Government’s witnesses before they have testified.” *Id.* (looking to
11 the Fed. Rules Crim. Proc. 16(a)(2), 26.2 as guidance). “In a civil case, by contrast, a
12 party is entitled as a general matter to discovery of any information sought if it appears
13 reasonably calculated to lead to the discovery of admissible evidence.” *Id.* (looking to
14 the Fed. Rule Civ. Proc. 26(b)(1) for guidance). A hearing on defendants' Motion to
15 Vacate would result in improper disclosures relevant to the criminal matter, prying into
16 the prosecution’s case in a manner not otherwise permitted.

17 A hearing on this matter would necessarily require the government to disclose its
18 thought processes and strategy related to defendants' constitutional challenges to the
19 pending criminal proceeding. In opposing defendants' arguments of constitutional
20 violations, the government would need to walk through the Superseding Indictment and
21 argue to the Court what inferences it should conclude from the pled facts. These
22 inferences would be the same inferences the United States has itself drawn in its
23 investigation of the criminal matter and would argue to the jury at the criminal trial.
24 This hearing would result in a preview of the government’s strategy in the criminal
25 trial. What is more, by their Motion to Vacate, defendants essentially seek a hearing
26 that would impermissibly require this Court to rule on ultimate issues that could later be
27 binding on the District Court of Arizona in the criminal matter. *See United States v.*
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1 *Mongol Nation*, 132 F. Supp. 3d 1207, 1217 (C.D. Cal. 2015), rev'd and remanded on
2 other grounds, 693 F. App'x 637 (9th Cir. 2017) ("Defendant has not provided any
3 legal support for the proposition that dismissal of the Indictment or striking the request
4 is the appropriate remedy for a flawed criminal forfeiture allegation. Further, there are
5 many possible outcomes in the course of trial, conviction, and enforcement of any
6 potential forfeiture, such that any adjudication of the constitutional issues would
7 essentially constitute an advisory opinion").

8 **C. Following Any Civil Complaints, the Government Intends to Seek a Stay**
9 **of Civil Forfeiture Proceedings Pending the Outcome of Criminal**
10 **Proceedings**

11 Sometime in September 2018, the government intends to file civil forfeiture
12 complaints in CDCA related to the allegations contained in the Superseding Indictment
13 filed in the District of Arizona. Following such filings, pursuant to 18 U.S.C. §
14 981(g)(1), the government expects to seek a stay of those civil forfeiture proceedings
15 pending the outcome of the criminal case. Specifically, Section 981(g)(1) requires a
16 stay of "the civil forfeiture proceeding" if the court determines that civil discovery will
17 adversely affect a related criminal investigation or case. 18 U.S.C. § 981(g)(1).

18 Relatedly, should the Court find that defendants' motion is properly entitled to a
19 hearing, the government requests that such a hearing be considered to function as a
20 request for discovery in the related CDCA civil forfeiture proceeding. Since the
21 government anticipates seeking a stay of any CDCA civil forfeiture proceedings, the
22 government intends to first litigate the related criminal matter pending in the District of
23 Arizona. This also is consistent with the U.S. Attorney's Office's policy of staying
24 related civil forfeiture proceedings in order to avoid implicating the rights of defendants
25 who likely will also be parties to civil actions, and who may be forced to elect between
26 subjecting themselves to civil discovery and invoking their Fifth Amendment rights.
27 Additionally, defendants would not be prejudiced by the granting of a stay, as they
28 would be free to pursue in the District of Arizona this or any similar motion defendants

1 felt appropriate.

2 **III. CONCLUSION**

3 For the reasons set forth herein, defendants' Motion to Vacate is improperly
4 brought before this Court and should be denied, or, in the alternative, the Court should
5 construe defendants' Motion as seeking discovery, and should order a stay of any civil
6 forfeiture proceedings related to the pending criminal matter in the District of Arizona.

7 Dated: September 14, 2018

Respectfully submitted,

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10 Assistant United States Attorney
11 Chief, Criminal Division

12 /s/John J. Kucera

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